YUKILON MANUFACTURING SDN. BHD. & ANOR.

v.

DATO' WONG GEK MENG & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-257-1996]
21 JANUARY 1997

LEGAL PROFESSION: *Solicitor and client - Authority to act - Solicitor acting for a company - Appointed to act by directors - Whether sufficient authority to act - Resolution of the board of directors - Whether a necesary prerequisite*

In this case, M/s. Gan & Lim, a firm of advocates and solicitors, had been appointed by the directors of the plaintiffs to act for the plaintiffs. The appointment, made vide a letter dated 7 December 1996, specifically requested that the solicitors initiate Court proceedings against the first, second and fourth defendants. The board of directors of the plaintiffs, however, had not passed any resolution appointing M/s. Gan & Lim to act for them. This being the case, before the learned Judge herein, a preliminary objection was raised by the defendants to the effect that M/s. Gan & Lim, by reason of the absence of the company's resolution, had not been lawfully appointed, and so, could not appear in the proceedings.

Held:

[1] The lack of authority of the solicitors to act can be challenged at any stage of the proceedings. Once the challenge has been advanced, like the present case, the burden of proving that the suit has been instituted with proper authority must rest on the plaintiffs.

[2] The sum total of arts. 93, 97 and 104 of the articles of association of the first plaintiff in no uncertain terms gave to the two directors of the first plaintiff the competency to exercise all the powers of the first plaintiff which must necessarily include and extend to the management of the business of the first plaintiff. Thus, when the two directors authorised M/s. Gan & Lim to take Court proceedings against the first, second and the fourth defendants, as reflected in the letter of 7 December 1996, that would be sufficient to vest M/s. Gan & Lim with the necessary powers to act accordingly.

[2a] Even if the plaintiffs had instituted the action without proper authority, ratification was still possible. Ratification in the context of the present case would be by convening a general meeting where the second plaintiff who held 55% shares in the first plaintiff would certainly vote for the continuance of the action against the defendants.

[Preliminary objection dismissed.]

Cases referred to:

Lawrence v. Campbell [1859] 4 Drew 485 ***(cit)***
O'Rourke v. Darbishire [1920] AC 581 HL ***(cit)***
Butler v. Board of Trade [1971] Ch. 680 ***(cit)***
Balabel v. Air India [1988] Ch. 317 ***(cit)***
Finers (a firm) v. Miro [1991] 1 All ER 182 ***(cit)***
Conlon v. Conlons Ltd [1952] 2 All ER 462 ***(cit)***
Beer v. Ward [1821] Jac 77 ***(refd)***
Davies v. Clough [1837] 8 Sim 262 ***(cit)***
Carter v. Palmer [1841] 8 C1 & Fin 657 ***(cit)***
Mellor v. Thompson [1885] 31 Ch. D. 55 CA ***(cit)***
Bate v. Kinsey [1834] 1 Cr. M & R 38 ***(cit)***
Minter v. Priest [1930] AC 558 at p. 579, HL ***(cit)***
Marshall's Valve Gear Company, Limited v. Manning, Wardle & Co., Limited [1909] 1 Ch. 267 ***(refd)***
William Jacks & Co (M) Bhd. v. Chemquip (M) Sdn. Bhd. & Anor. [1991] 3 MLJ 555 SC ***(refd)***
Danish Mercantile Co. Ltd. And Others v. Beaumont And Anor. [1951] All ER 925 CA ***(refd)***
Re L.Y. Sweet Co. Ltd.; Khoo Leong Kee v. L.Y. Sweet Co. Ltd. [1968] 2 MLJ 104 ***(cit)***
Alexander Ward and Co. Ltd v. Samyang Navigation Co. Ltd. [1975] 2 All ER 424 HL ***(cit)***
Simmons v. Liberal Opinion Ltd [1911] 1 KB 977 ***(refd)***
Chin Kok Kwong Const. Sdn. Bhd. v. Sunrise Towers Sdn. Bhd. [1986] 2 MLJ 41 ***(refd)***
United Investment & Finance Ltd. v. Tee Chin Yong & Ors. [1967] 1 MLJ 31 ***(refd)***
Bolden v. Nicholay [1857] 3 Jur NS 884 ***(refd)***
Adams v. London Improved Motor Coach Builders Ltd. [1921] 1 KB 495 CA ***(refd)***

For the plaintiff - M. Pathmanathan (Gan Techiong with him); M/s. Gan & Lim
For the defendant - Gana Muthusamy (Hardip Singh with him); M/s. Gana Muthusamy & Co.

JUDGMENT

Abdul Malik Ishak J:

A preliminary objection was advanced questioning the authority of M/s. Gan & Lim, Advocates and Solicitors, to act for the plaintiffs. It was the brunt of the argument that M/s. Gan & Lim was not lawfully authorised to appear in these proceedings for the plaintiffs as the company's resolution for their appointment was not exhibited. In the absence of the board of directors' resolution, the whole writ and the order of this Court dated 8 January 1997 (encl. 8) should be vacated, so submitted Gana Muthusamy for the defendants.

My attention was drawn to para. 15 of the affidavit of the first defendant in encl. 17 which contained the venom of the preliminary objection and to appreciate its magnitude one must read it. That para. 5 was worded thus:

> I verily believe that the first plaintiff has failed to secure a resolution of the board of directors or a resolution of the shareholders at the EGM to support the first plaintiff's action in filing this suit. Consequently, I have been advised that the plaintiff's solicitors did not have the authority to file this suit. My solicitors had on 11 January 1997 written to the solicitors of the plaintiffs for a copy of the resolution appointing them as solicitors. The said solicitors confirmed that they do not have any such resolution. A copy of the letter from my solicitors and the reply from the plaintiff's solicitors are annexed hereto and marked as 'W22a' and 'W22b'.

Exhibit "W22b" was a reply from M/s. Gan & Lim and it was dated 16 January 1997 - of particular relevance was the fourth paragraph which was worded in this fashion:

> As for your clients' request for a copy of our client's resolution appointing us, we are instructed to point out that there is no necessity for a company to pass a resolution in order to appoint solicitors, save to say that we did receive instructions in writing from our clients. Likewise, the third and fourth defendants, for whom you entered appearance for, could not have passed a resolution prior to their appointing you to act for both of them!

Gana Muthusamy used this letter as a leverage and strenuously argued that M/s. Gan & Lim agreed that there was no resolution and even went beyond that to say that there was no necessity for such a resolution. This simply won't do, so submitted Mr. Gana Muthusamy.

Mr. M. Pathmanathan for the plaintiffs submitted that the challenge to the solicitor's authority to appear should not be mounted unless there was good and sufficient ground. A challenge of this nature was said to be a personal

attack on the solicitor's integrity and standing in a Court of law. Gan Techiong echoed the same sentiment and it was his complaint that it was an affront to his law firm to say that they act without authority from the plaintiffs. M. Pathmanathan submitted that it was not the law that before a solicitor files the memorandum of appearance a resolution from the board of directors appointing the solicitor to act must first be tabled and passed. It was sufficient, as in this case, for two authorised persons from the plaintiffs' company to appoint them. M. Pathmanathan informed this Court that he had with him a letter of authority from the plaintiffs addressed to M/s. Gan & Lim authorising them to act but he submitted that the letter was in the form of a privileged communication - more in the nature of a solicitor client relationship. It is now trite law that a solicitor cannot be compelled to disclose communications, whether oral or written, passing directly or indirectly between him and his client, or between him and a person who is communicating with him professionally with a view to becoming his client. It is said to be a privileged communication if it is for the purpose of giving or receiving legal professional advice. Communication of this nature must be legitimate in the sense that they are not made in furtherance of fraud or crime. I must say that that privilege extends to information which a solicitor receives in his professional capacity from a third party and subsequently it is conveyed to the client: *Lawrence v. Campbell* [1859] 4 Drew 485; *O'Rourke v. Darbishire* [1920] AC 581 HL which dutifully was followed by *Butler v. Board of Trade* [1971] Ch. 680, [1970] 3 All ER 593. It must be remembered that the document need not specifically contain advice: *Balabel v. Air India* [1988] Ch. 317, [1988] All ER 246 CA. The final say would be with the Court who will determine whether privilege may be set aside on an application by a solicitor who suspects fraud or crime by his client: *Finers (A firm) v. Miro* [1991] 1 All ER 182, [1991] 1 WLR 35 CA. It must be emphasised that a communication made by a client to his solicitor for the purpose of being repeated to the other side is not privileged if and only if the solicitor's authority to compromise a case is in question (*Conlon v. Conlons Ltd.* [1952] 2 ALL ER 462, [1952] 2 TLR 343 CA) Now, the crucial question to ask would be this: What is the effect of the privilege as claimed by M. Pathmanathan? The effect of that privilege would be that neither the client, nor the solicitor without his consent can be compelled to disclose the communications in the cause of legal proceedings. Here, the privilege would solely be that of the client's, not the solicitor's and that being the case the client may restrain the solicitor from making disclosure (*Beer v. Ward* [1821] Jac 77; *Davies v. Clough* [1837] 8 Sim 262; *Carter v. Palmer* [1841] 8 C1 & Fin 657 at 707 HL; and *Mellor v. Thompson* [1885] 31 Ch. D. 55 CA) or may waive the privilege entirely (*Bate v. Kinsey* [1834] 1 Cr. M & R 38; and *Minter v. Priest* [1930] AC 558 at p. 579, HL, per Lord Atkin). Translating these principles to the facts

of the present case, the position would be this: Until the plaintiffs have waived the privilege it is M. Pathmanathan's duty, if he is requested to make that disclosure, to claim the privilege (*Beer v. Ward* (*supra*)). Surprisingly, M. Pathmanathan was willing to waive that privilege when he broke the stalemate by showing to this Court the letter in question. Having read the said letter, I ordered that it be shown to Gana Muthusamy. The letter was dated 7 December 1996 from the first plaintiff addressed to M/s. Gan & Lim, Advocates and Solicitors with the following caption and contents:

> **Re: Court Proceedings against Dato' Wong Gek Meng, Wong Geok Cheong and Supertex Mfg Sdn. Bhd.**
>
> We refer to our meetings about the above matter.
>
> We understand that the one and only way to preserve evidence of breach of fiduciary duties and breach of trust against our director Dato' Wong Gek Meng and general manager Wong Geok Cheong is to apply for what your Gan Techiong called (an) Anton Piller Order. If Dato' Wong and his brother know about our application early, they would definitely move everything away, or even destroy evidence. So, it is very important that they must not know about the Court proceedings at this stage.
>
> We confirm that our company must sue Dato' Wong, Wong Geok Cheong and Supertex Mfg Sdn Bhd as soon as possible, and for that purpose we appoint you as our solicitors.
>
> Please proceed as soon as possible. Thank you.
>
> Yours faithfully,
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> | | |
> |---|---|
> | Sgd. | Sgd. |
> | ... | ... |
> | M. Sakamoto | Makoto Togase |
> | Director | Director |

In my judgment, this letter gives authority to M/s. Gan & Lim to act for the first plaintiff. There was undisputed evidence that the second plaintiff owns 51% shares of the first plaintiff. In the event of a tie at the board meeting, a general meeting can certainly be convened to rectify the transaction and the will of the second plaintiff would in that event prevail. Article 93 of the articles of association of the first plaintiff states, *inter alia*, that the directors may meet together for the despatch of business and that until otherwise determined two directors shall form a quorum. Article 97 of the articles of association of the first plaintiff sets out the powers of directors at a meeting. It states that:

> A meeting of directors for the time being at which a quorum is present shall be competent to exercise all or any of the authorities powers and discretions by or under the articles of the company for the time being vested in or exercisable by the directors generally.

Of pertinence, would be art. 104 of the articles of association of the first plaintiff and it is worded thus:

> The management of the business of the company shall be vested in the directors and the directors may exercise all such powers and do all such acts and things as the company is, by its memorandum of association or otherwise authorised to exercise and do and are not hereby or by the companies act directed or required to be exercised or done by the company in general meeting but subject nevertheless to the provisions of the companies act and of these articles and to any resolutions not being inconsistent with these articles from time to time made by the company in general meeting provided that no such regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Now, the sum total of arts. 93, 97 and 104 of the articles of association of the first plaintiff in no uncertain terms gave to the two directors of the first plaintiff the competency to exercise all the powers of the first plaintiff which must necessarily include and extend to the management of the business of the first plaintiff. Thus, when the two directors authorised M/s. Gan & Lim to take Court proceedings against the first, second and the fourth defendants as reflected in the letter dated 7 December 1996 that would be sufficient to vest M/s. Gan & Lim with the necessary powers to act accordingly. The case of *Marshall's Valve Gear Company, Limited v. Manning, Wardle & Co., Limited* [1909] 1 Ch. 267 is germane as it provides a good guideline to the present case. In that case *Marshall* was the company's managing director and the majority shareholder. In that capacity he commenced an action in the company's name to restrain an alleged infringement of patent. The other directors went to Court to stay the action on the ground that it had been commenced without the authority of the company. Neville J took cognizant of the fact that no general meeting had been called. His Lordship felt that it would be pointless to call one since the result would be a foregone conclusion as Marshall controlled the majority of the votes and would accordingly vote for the continuance of the action. His Lordship refused to interfere with the action as he felt that the action had been brought with the approval of the majority of the members of the company.

The then Supreme Court had occasion to consider in *William Jacks & Co (M) Bhd v. Chemquip (M) Sdn Bhd & Anor* [1991] 3 MLJ 555 SC the question of whether an oral preliminary objection questioning the authority of certain solicitors to act for the appellant should be entertained forthwith or be

stayed pending a formal application by motion or summons. Gunn Chit Tuan SCJ delivering the judgment of the Court was of the view that a challenge to the authority of solicitors may be made at any time and the Court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck out if there was sufficient or admitted evidence that there was no action properly before it. But where there was no such evidence, the Court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons. I do not propose to stay the whole proceedings of the present case pending a formal application to be filed by Gana Muthusamy as suggested by *William Jacks* (*supra*) as there was enough material for me to make a ruling in favour of the plaintiffs in regard to the oral preliminary objection.

Now, even if (there was no evidence here) the plaintiffs instituted the action without proper authority ratification was still possible. Ratification in the context of the present case would be by convening a general meeting where the second plaintiff who held 55% shares in the first plaintiff would certainly vote for the continuance of the action against the defendants (per Neville J in *Marshall's Valve Gear Company, Limited v. Manning, Wardle & Co., Limited* (*supra*)). In *Danish Mercantile Co. Ltd. And Others v. Beaumont And Anor.* [1951] All ER 925 CA, an action was started in the name of a company without its authority, and later the company went into liquidation and the liquidator adopted the proceedings on behalf of the company. Jenkins LJ writing a separate judgment had this to say (at p. 930):

> I think the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so, or under an erroneous assumption as to the authority, does so at his own peril, and, so long as the matter rests there, the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, providing the aggrieved defendant does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings, and to say: 'I approve of all that has been done in the past and I instruct you to continue the action.' When that has been done, then, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority. For these reasons I am of the opinion that the learned Judge came to a right conclusion and that this appeal fails and should be dismissed.

I am constrained to say that the preliminary objection was not on the issue of ratification but rather in regard to appointment of M/s. Gan & Lim as solicitors for the plaintiffs *(Re L.Y. Swee & Co. Ltd*; *Khoo Leong Kee v. L.Y. Swee*

a *& Co. Ltd* [1968] 2 MLJ 104). Ratification was vigorously applied in *Alexander Ward and Co. Ltd v. Samyang Navigation Co. Ltd.* [1975] 2 All ER 424 HL following closely the decision of *Danish Mercantile Co. Lt.d And Others v. Beaumont And Anor.* (*supra*).

b All the authorities show that the lack of authority of the solicitors to act can be challenged at any stage of the proceedings (*Simmons v. Liberal Opinion Ltd.* [1911] 1 KB 977; *Re L.Y. Swee & Co. Ltd*; *Khoo Leong Kee v. L.Y. Swee & Co. Ltd* (*supra*); and *Chin Kok Kwong Const. Sdn. Bhd. v. Sunrise Towers Sdn. Bhd.* [1986] 2 MLJ 41 at p. 42). Once the challenge has been advanced, like the present case, the burden of proving that the suit had been *c* instituted with proper authority must rest on the plaintiffs (*United Investment & Finance Ltd v. Tee Chin Yong & Ors.* [1967] 1 MLJ 31 at p. 35). In the present case, the statement of claim was dated 16 December 1996 while the writ of summons was dated 18 December 1996. Both the writ of summons and the statement of claim were filed on 18 December 1996 after M/s. Gan *d* & Lim were retained as solicitors for the plaintiffs by letter dated 7 December 1996. In my judgment, the letter dated 7 December 1996 was an act of authorisation - authorising or employing M/s. Gan & Lim to act on behalf of the plaintiffs. This constitutes the solicitor's retainer by the client. By the giving and acceptance of the retainer the solicitor acquires his authority to act for *e* the client and whatever the solicitor does it would bind the client. The client thus becomes bound both personally as between himself and his solicitor (*Bolden v. Nicholay* [1857] 3 Jur NS 884; *Adams v. London Improved Motor Coach Builders Ltd.* [1921] 1 KB 495, CA where the presumption is that the client is liable for the solicitor's costs) and as between himself and third *f* persons. As a general rule, a person has the right to retain the solicitor of his own choice so long as the solicitor is willing to act and is not precluded by the law or by the professional rules from so doing. There is nothing to prevent M/s. Gan & Lim to act for the plaintiffs. The letter dated 7 December 1996 put the issue of authorisation to act to rest. For the foregoing reasons, I dismissed the preliminary objection with costs.

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Reported by WA Sharif

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